

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)
 v.) DEF. I.D.: 1006007816
)
 TERRY ANDERSON,)
)
 Defendant.)

Date Submitted: October 8, 2010

Date Decided: October 14, 2010

MEMORANDUM OPINION.

Upon Consideration of Defendant's Motion to Suppress.

DENIED.

Daniel B. McBride, Deputy Attorney General. Attorney for the State of Delaware.

Louis B. Ferrara, Esquire. Attorney for the Defendant.

SLIGHTS, J.

I.

The defendant, Terry Anderson, has moved to suppress evidence of his performance on various field sobriety tests and the results of an intoxilyzer breath test, all of which led to his being charged with driving a vehicle while under the influence of alcohol or with a prohibited alcohol content. Mr. Anderson alleges that the arresting officer lacked a reasonable articulable suspicion of criminal activity in order to stop his vehicle, and that the officer lacked probable cause to arrest him for driving under the influence of alcohol. For the reasons that follow, the Court finds that both the stop of Mr. Anderson's vehicle and his subsequent arrest for driving under the influence were lawful under both the United States and Delaware constitutions and Delaware statutory law. Accordingly, the motion to suppress must be **DENIED**.

II.

On June 9, 2010, at approximately 12:00 a.m., Corporal Jandre Lafate of the Delaware State Police observed a black Chevrolet Blazer traveling southbound on Route 896 approaching the Summit Bridge. He noticed the vehicle drift onto the right shoulder (approximately 3-6 inches) and then "sharply" course-correct back into the marked lane of travel. He then observed the vehicle make several other abrupt course corrections, albeit within the lane markings. At one point the vehicle was

observed to drift slightly into the passing lane of southbound 896 only again to course-correct with an abrupt shift to the right. Corporal Lafate then observed that the Blazer traveled dangerously close behind a vehicle that was making a right turn from Route 896 onto Bethel Church Road. At the suppression hearing, he explained that the Blazer nearly committed a “rear-end type of offense” prevented only when the Blazer’s operator abruptly applied his breaks to avoid the collision. Upon observing this near miss, Corporal Lafate activated his emergency equipment which prompted the operator of the Blazer (later determined to be the defendant, Terry Anderson) to pull over immediately. According to Corporal Lafate, Mr. Anderson’s vehicle had traveled no more than a mile and a half during the time it was under his observation.

When the officer approached the driver’s side window of the Blazer he noticed that Mr. Anderson’s left hand (with driver’s licence) was outstretched towards the window and that Mr. Anderson was leaning into the passenger compartment apparently in search of the vehicle’s registration and insurance cards. Corporal Lafate found Mr. Anderson’s lack of eye contact to be somewhat suspicious. When Mr. Anderson did turn towards him, Corporal Lafate immediately detected a “strong odor of alcohol” on his breath and also observed that his eyes were “bloodshot, glassy and watery” and that his face was “flushed,” all physical signs that Corporal Lafate

associated with possible intoxication. The officer asked Mr. Anderson to recite the alphabet which he did successfully. Corporal Lafate confirmed that Mr. Anderson's speech was "good" (not slurred) throughout their encounter.

In response to questions, Mr. Anderson advised the officer that he was coming from the St. John's carnival where he had consumed approximately "three beers." He stated that he was headed to his girlfriend's house in Middletown on "the other side of the canal." Corporal Lafate found Mr. Anderson's explanation of his destination to be particularly odd since both he and Mr. Anderson had just crossed over the canal immediately prior to the vehicle stop. At this point, Corporal Lafate directed Mr. Anderson to exit his vehicle so that he could perform field sobriety tests.

Prior to administering the field tests, Corporal Lafate asked Mr. Anderson if he had any physical limitations that would prevent him from conducting the tests. According to Corporal Lafate, Mr. Anderson advised him that he had sustained a leg injury at some point in the past and that his leg may be "a little weak to stand on." Corporal Lafate did not inquire further and began to administer the tests. As it turns out, Mr. Anderson had been diagnosed by MRI with a torn meniscus in his left knee (with floating bone fragments) only a week or so before the stop.¹

¹The Court received a copy of the MRI report into evidence as a defense exhibit over the State's objection.

The first field test performed was the “walk and turn” test. Prior to the test, Mr. Anderson was instructed to walk heel-to-toe on an imaginary straight line, pivot and turn, and then return to his starting point by again walking heel-to-toe on an imaginary straight line. The test was administered according to National Highway Traffic Safety Administration (“NHTSA”) standards. According to Corporal Lafate, Mr. Anderson failed this test.

The next test administered was the “one leg stand test,” again administered in accordance with NHTSA standards. And, again, according to Corporal Lafate, Mr. Anderson failed the test because he “swayed,” “hopped,” and failed to keep his leg raised for the requisite time.

The next test administered was the “finger-to-nose” test. This is not a NHTSA test. Mr. Anderson failed this test as well, according to Corporal Lafate, because he placed his fingertips immediately beneath the tip of his nose.

The final test administered was the Horizontal Gaze Nystagmus (“HGN”) test, a highly regulated NHTSA test that allows the investigating officer to detect involuntary movements (jerking) of the eye. These involuntary movements have been linked scientifically to alcohol intoxication. According to Corporal Lafate, NHTSA directs the investigator to look for six clues of intoxication during the HGN test and Mr. Anderson displayed all six. After failing the HGN test, Mr. Anderson was placed

under arrest for driving under the influence of alcohol and taken to Troop 9 where he volunteered to submit to an intoxilyzer test of his breath.²

III.

In his motion, Mr. Anderson contends that Corporal Lafate lacked a legal basis to stop his vehicle. He contends that the two instances where his vehicle “drifted” within the lane of travel and the one instance where his vehicle allegedly was too close to the vehicle in front of him do not give rise to a reasonable articulable suspicion that he had committed a traffic offense. Assuming *arguendo* that the Court finds that the traffic stop was proper, Mr. Anderson contends that his subsequent arrest was not supported by probable cause because, under the circumstances, his performance on the field sobriety tests did not give rise to a “fair probability” that he was operating his vehicle under the influence of alcohol.

Not surprisingly, the State disagrees. According to the State, Mr. Anderson’s drifting and abrupt course corrections, when coupled with the near miss rear-end collision, provided more than reasonable suspicion that he was committing traffic offenses. Moreover, according to the State, Mr. Anderson’s failure of nearly all of

²The record suggests that Corporal Lafate also administered a portable breath test to Mr. Anderson, but the State did not elicit evidence regarding the results of this test because it could not establish that the machine had been properly calibrated. *See Miller v. State*, 2010 WL 2253743, at *2 (Del. June 7, 2010)(holding that State must establish that the machine used to administer portable breath test was properly calibrated before admitting test results). Accordingly, the Court did not consider the portable breath test in reaching this decision.

the field sobriety tests administered to him, coupled with the officer's other observations, provided ample probable cause to arrest him for driving under the influence of alcohol .

IV.

A. Standard of Review

On a Motion to Suppress, the State bears the burden of establishing that the challenged search or seizure comported with the rights guaranteed Defendant by the United States Constitution, the Delaware Constitution, and Delaware statutory law.³ The burden of proof on a motion to suppress is proof by a preponderance of the evidence.⁴ In this case, the State must establish that Corporal Lafate's initial stop of Mr. Anderson's vehicle was supported by a reasonable articulable suspicion that he had committed a criminal or traffic offense.⁵ The State must then establish that the decision to arrest Mr. Anderson was supported by probable cause.⁶

³ *Hunter v. State*, 783 A.2d 558, 560-61 (Del. 2001).

⁴ *State v. Bien-Aime*, Del. Super., Cr. A. No. 1K92-08-326, Toliver, J. (March 17, 1993) (Mem. Op.) (citations omitted).

⁵ *State v. Rickards*, 2010 WL 2802905, at *4 (Del. Super. Jul. 13, 2010)(reiterating that reasonable articulable suspicion must be established to support a traffic stop).

⁶ *See Miller v. State*, 2010 WL 2253743, at *2 (Del. June 7, 2010)(holding that probable cause to arrest in driving under the influence case must be determined "by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience.").

B. The Vehicle Stop

The parties agree that the question of whether the initial vehicle stop was lawful boils down to whether Corporal Lafate possessed a reasonable articulable suspicion that Mr. Anderson had engaged in conduct that could constitute a traffic offense prior to the stop. The Court concludes that he did and that the stop was lawful. In this regard, the Court finds it significant that in the span of only a mile and a half, Corporal Lafate observed Mr. Anderson's vehicle drift from its lane of travel (albeit modestly) on at least two occasions. Both times Mr. Anderson abruptly corrected his course to return to his lane of travel. In between the drifting, Corporal Lafate noticed Mr. Anderson making several "sharp" corrections in order to keep his vehicle within the designated lane markings. He then noticed Mr. Anderson's vehicle begin to accelerate as the road descended even as the vehicle in front of him was slowing to make a right turn. This traffic dynamic resulted in Mr. Anderson barely avoiding a "rear-end" collision with the turning vehicle.

Whether *vel non* Corporal Lafate's observations of Mr. Anderson's driving ultimately would (or will) support convictions for improper lane change⁷ (Count II of the indictment) or careless/inattentive driving (Count III) remains to be seen. But guilt beyond a reasonable doubt is not the operative standard here. Rather, the State

⁷21 Del. C. § 4122.

was obliged to establish by a preponderance of the evidence only that Corporal Lafate had pointed to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion [of a vehicle stop].”⁸ The State’s proof met this standard.

Mr. Anderson points to this Court’s decision in *State v. Blank*⁹ in support of his argument that isolated instances of a vehicle drifting from its lane of travel cannot give rise to a reasonable articulable suspicion to stop the vehicle. *Blank* does not help him, however, because it is distinguishable on several grounds. First, in *Blank*, the court was reviewing a decision of the Court of Common Pleas where the lower court had determined that the stop of the defendant’s vehicle was not supported by reasonable articulable suspicion. In reviewing this decision, this Court went to some length to emphasize the limited standard of review, noting that “[t]he issue on appeal is not whether this Court would have reached the same conclusion or even agrees with it, but whether the reasoning of [the lower court] was logical and the decision sufficiently supported both legally and factually by the court’s findings.”¹⁰ No such

⁸See *Jones v. State*, 745 A.2d 856, 861 (Del. 1999). See also *Ingram v. State*, 2004 WL 2154325, at * 2 (Del.)(holding that officer may direct a defendant to exit vehicle to perform field tests upon forming reasonable articulable suspicion).

⁹2001 WL 755932 (Del. Super.).

¹⁰*Id.* at *1 (citations omitted).

limited standard of review applies here. Moreover, and perhaps more importantly, *Blank* is factually distinguishable in that the record there did not support an inference that the defendant had failed to ascertain whether he could return to his lane of travel safely before correcting his course of travel.¹¹ Here, Corporal Lafate described several instances where Mr. Anderson altered his travel to return to or stay within his marked lane by “sharp” course corrections, apparently made without any attempt to account for his surroundings. Moreover, drifting in and out of marked lanes was not the only basis upon which Corporal Lafate decided to stop Mr. Anderson’s vehicle. The decision to effect the vehicle stop was made only after Mr. Anderson nearly collided with another vehicle after following too closely to it.

C. The Arrest

Prior to engaging in the probable cause analysis here, the Court must first determine what is and what is not competent evidence within the “totality of circumstances” leading to Mr. Anderson’s arrest. Specifically, the Court must determine which of the field sobriety tests it will consider as a basis to support Corporal Lafate’s determination that he had probable cause to believe that Mr. Anderson was operating his vehicle while intoxicated. In this regard, Mr. Anderson urges the Court not to consider his performance on the “walk and turn” test and the

¹¹*Id.* at *2..

“one leg stand” test. According to Mr. Anderson, the fact that he was suffering from a rather significant knee injury at the time he took these tests renders the results, at best, suspect. The Court agrees.

According to Corporal Lafate, Mr. Anderson advised him that he had sustained a leg injury and that the injury rendered his leg “a little weak to stand on.” The MRI of Mr. Anderson’s knee taken approximately the week prior to the stop confirmed structural damage to the left meniscus. On cross examination, Corporal Lafate acknowledged that he probably should have inquired more thoroughly into the nature of the injury before administering the field sobriety tests. He also acknowledged that NHTSA guidelines, at the very least, question the efficacy of the more physically demanding field tests in the presence of certain injuries. Given that Mr. Anderson’s knee injuries confound the results of the “walk and turn” and the “one leg stand” tests, the Court will not consider them in its probable cause analysis.

Likewise, the Court discounts the significance of Mr. Anderson’s explanation that he was on his way to his girlfriend’s house “on the other side of the canal” in response to the officer’s question regarding his destination. While Corporal Lafate interpreted this comment to suggest that Mr. Anderson was disoriented (since Mr. Anderson was himself on the “other side of the canal” when he made the comment), it is equally as reasonable to interpret the comment as stating a fact - Mr. Anderson’s

girlfriend lived “on the other side of the canal” from where he lived. As most Delawareans will attest, it is not uncommon to use the canal as a point of reference when describing places (and people) within the State and the Court does not find Mr. Anderson’s use of the reference in this case to be reflective of disorientation on his part.

Nor is the Court terribly concerned by Mr. Anderson’s initial reaction upon encountering Corporal Lafate. While it is understandable that Corporal Lafate would have been surprised to find that an outstretched hand thrusting a driver’s license in his face was Mr. Anderson’s first effort to communicate with him, the Court cannot say that this gesture, when coupled with Mr. Anderson’s simultaneous search for vehicle registration and insurance, adds much to the probable cause analysis.

This leaves the following facts in the totality of circumstances that Corporal Lafate could have relied upon to determine that he had probable cause to arrest: (1) Mr. Anderson’s erratic driving leading to the stop of his vehicle; (2) the strong odor of an alcoholic beverage on his breath; (3) his bloodshot, glassy and watery eyes; (4) his flush face; (5) his admission to consuming alcohol (presumably at the St. John’s carnival from where he had just left); (6) his failure (albeit barely) of the finger-to-nose test; and (7) his failure (by all six clues) of the HGN test which, alone, indicated to the arresting officer a 77% likelihood that his blood alcohol concentration was

.10% or higher according to NHTSA data. For his part, Mr. Anderson directs the Court's attention to several factors that he believes dilute the State's probable cause proofs, including: (1) his ability to maintain "good" speech throughout his encounter with Corporal Lafate; (2) his cooperative demeanor; (3) his success on the "alphabet" test; and (4) his "very nearly passing" performance on the finger-to-nose test.

On balance, the Court is satisfied that the totality of the circumstances supports Corporal Lafate's determination that he had probable cause to arrest Mr. Anderson for driving under the influence of alcohol.¹² While it is true, as Mr. Anderson contends, that there are facts weighing against a finding of probable cause, the preponderance of the evidence - - erratic driving, odor of alcohol, bloodshot, glassy and watery eyes, admitted alcohol consumption, and failed field tests (particularly the HGN test) - - tips the scale in support of Corporal Lafate's decision to arrest.¹³

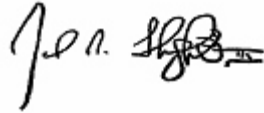
¹²See *Miller*, supra at *2 (holding that odor of alcohol, two failed field tests [excluding HGN and acknowledging several passed tests], admitted alcohol consumption [two beers], and vehicle crash [unwitnessed] were sufficient to constitute probable cause to arrest for driving under the influence); *Bease v. State*, 884 A.2d 495 (Del. 2005)(holding that vehicle accident, odor of alcohol, rapid speech, bloodshot glassy eyes, and admission to consuming alcohol were sufficient to establish probable cause).

¹³See *State v. Hunter*, 2004 WL 2744513, at *2 (Del. Super.) (emphasizing the "preponderance of the evidence" burden of proof on a motion to suppress).

V.

Based on the foregoing, Defendant's Motion to Suppress must be **DENIED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Joe R. Slights, III". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

Judge Joseph R. Slights, III

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